

**Before the
Federal Communications Commission
Washington, DC 20554**

In the matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
)	

To: The Commission

**REPLY COMMENTS OF
UNITED STATES CELLULAR CORPORATION**

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Summary

USCC is devoted to America's rural areas. It has customer satisfaction levels that exceed every industry metric and as a result its churn rates are among the best in the industry. USCC comes before this Commission seeking a level playing field and fair rules that permit competitive ETCs ("CETCs") to drive infrastructure development, advance universal service, and bring the benefits of *facilities-based* competition to rural areas.

We encourage the Commission to continue implementing the 1996 Act as it was written, and encourage efficient carriers to enter rural markets to bring consumers the same kinds of choices in services that are available in urban areas. USCC has used support in several states to do just that, and it illustrates one example of how federal support is accelerating its network construction in rural Wisconsin.

Without question, the Commission must look closely at requiring ILECs to disaggregate support, at least to the wire center level, to move support away from low-cost areas and out to high-cost areas. Disaggregation will prevent CETCs from receiving excess subsidies for serving low-cost areas while increasing the support available to CETCs who properly target higher-cost areas that by and large have the fewest choices in services.

Some rural ILECs have sponsored a litany of suggestions that mirror their strategies at the state level – attempting to impose as many barriers to entry and other proposals designed solely to discourage competitor by raising the cost of doing business so high that none would consider entering. The Commission ruled many years ago in its *First Report and Order* that a carrier does not need to be regulated like an ILEC to be an ETC. ILECs face substantial regulation not because they get ETC support, but because they are monopoly carriers and the public requires protection from monopoly business practices. Now, attempts to regulate carriers

that operate in a fiercely competitive market, must be rejected in favor of a model under which carriers compete for customers *and* support so that regulatory burdens on ILECs can be lowered when they no longer exert monopoly control over their markets.

Likewise, a suggestion to create a multi-tiered support scheme for wireless carriers based on their size is a complete non-starter for the wireless industry. Sponsored by ILECs and their wireless affiliates, the proposal is not a “compromise” at all. It is not competitively neutral, completely insulates ILECs from competition, and disqualifies otherwise qualified carriers for support solely based on their size. In short, it is bad policy.

In USCC’s experience in 26 states, CMRS carriers are not competing with rural ILECs in the market for local exchange service. In Maine, where USCC has recently applied for ETC status, consumers in many rural areas have submitted testimony concerning the lack of high-quality wireless service in their communities and how that lack of service is hampering health and safety, law enforcement and economic development. Rather than impose higher barriers to entry, the Commission should encourage states to accelerate the designation of qualified carriers.

Suggestions to provide support to competitors based on the competitors’ costs should also be rejected. With no incentives for wise or efficient investments, such a scheme would balloon the size of the fund and have no countervailing benefits for rural consumers. Only through portable per-line support can the Commission encourage efficient carriers to enter and provide sufficient support to ensure that rural consumers have choices in telecommunications services that are reasonably comparable to those in urban areas.

USCC urges the Commission to measure its actions by the yardstick of competitive neutrality, to use per-line support and disaggregation of ILEC support to provide sufficient support to consumers, and to encourage states to designate qualified ETCs promptly.

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United States Cellular Corporation (“USCC”), by counsel, hereby provides the following reply comments in response to the Commission’s *Notice of Proposed Rulemaking*, FCC 04-127 (released June 8, 2004) requesting comment on the recent *Recommended Decision* of the Federal-State Joint Board on Universal Service (“Joint Board”).¹

**I. ADVANCING UNIVERSAL SERVICE WHILE ENCOURAGING
COMPETITION MUST DRIVE EVERY FCC DECISION IN THIS
PROCEEDING.**

The FCC has harmonized the twin goals of advancing universal service while promoting competition – the central tenet of the 1996 Act.² Competitive carriers providing comment in this proceeding have advanced positions consistent with these twin goals, and have offered several means of constraining fund growth that do not involve changing the system dramatically or thwarting the will of Congress.

On the other hand, the 1300+ rural ILECs have, individually and through their trade organizations, put forth a plethora of comments that, if adopted, would cement their monopoly

¹ *Federal-State Joint Board on Universal Service, Recommended Decision*, 19 FCC Rcd 4257 (Jt. Bd. 2004) (“2004 Recommended Decision”).

positions and lock competition out of rural areas. Some of those commenters recommend the Commission take disturbingly improper actions and obviously seek a guarantee of market outcomes in their favor. Others recommend literally dozens of small changes that individually would not be significant, but taken together would make it unlikely that any competitor would enter rural markets.

Sprint's perspective deserves attention because the company is in all three markets central to the universal service debate, local exchange, long distance, and wireless. Sprint pays substantial amounts into the system through its long distance and wireless businesses, yet supports fair policies because of its core belief that the commission must follow the law that Congress wrote, and its inherent understanding that wireless is the future for all Americans and universal service policy must ensure that advanced technologies are available in rural areas.

Eight years ago, this Commission set the proper course, and it must continue to do so. Every decision must be measured by whether it meets the twin goals of advancing universal service and promoting competition, so that rural consumers who pay into the fund have a legitimate opportunity to enjoy the benefit of those services for which they contribute.

II. THE CURRENT SYSTEM, THAT IS JUST BEGINNING TO DELIVER BENEFITS TO RURAL CONSUMERS, DOES NOT REQUIRE MAJOR CHANGES.

A. The Commission Must Promote Entry by Carriers Who Can Deliver Universal Service Efficiently.

Some have cast this debate as how to constrain fund growth caused by new ETCs entering the market. Constraining growth in the fund must be a secondary concern to the

² "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, preamble, 110 Stat. 56.

Commission's first goal – to provide sufficient support for consumers living in high-cost areas. That is what the Act requires.³

There should be a consensus that, all else equal, a smaller fund is better than a larger one. If a smaller, or more stable, fund is desirable, then one simple question should be addressed: What public policy favors supporting what everyone seems to agree is the less-efficient provider of universal service? As Centennial correctly observes:

[I]t would be profoundly unfair to simply take at face value that the rural ILEC in an area is “entitled” to \$30 or \$50 or \$100 or more per line per month based on little more than its say-so, and yet engage in extended regulatory soul-searching over whether the “public interest” is served by permitting a second ETC in the area to receive the same amount per line.⁴

One cannot properly address the issue of whether the designation of an additional ETC would unduly burden the Fund without first asking whether the rural ILEC in that area is incurring costs in an efficient manner. Indeed, if wireless is a lower-cost alternative for many rural areas, then the Commission should be aggressively promoting its introduction so that support levels in such areas can be reduced.

Some have commented that because wireless is more efficient, it receives a “windfall” under the current mechanism. This is simply not true. The entire purpose of a per-line support methodology is to encourage carriers that are more efficient than the incumbent to enter the market. If a competitor is less efficient, it will not enter. If it is more efficient, then it will enter, however it will not receive more support than the incumbent simply because new entrants have far fewer lines than monopoly carriers that have nearly 100% market penetration in rural America. During the time that line counts grow, CETCs are required to spend all support on

³ 47 U.S.C. Section 254(b)(3); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000).

⁴ Comments of Centennial Communications Corp. at p. 10.

facilities and services for the benefit of consumers in its ETC service area. Thus, even a very efficient competitor will need every dollar of support to construct, improve and maintain new networks to compete with the incumbent and respond to all reasonable requests for service.⁵ Likewise, there is little doubt that efficient competition provides a parallel incentive for rural ILECs to reduce their costs as well, easing the long-term burden on the fund.

If everyone agrees that constraining fund growth is an appropriate goal, then there should be a consensus that we should neither shock incumbents nor artificially limit customer choice. Indeed that was the FCC's precise approach in the 2001 *Fourteenth Report and Order*, when it encouraged competitors to enter, protected ILECs from competitive shocks by installing the modified embedded cost system for five years, and implemented rules for disaggregating high-cost support in rural areas.⁶ Since 2001, rural ILECs have been on notice that competition is coming and that they must use the transition period provided by the modified embedded cost system to become more efficient and prepare for the day when they must compete on a level playing field with other carriers seeking to enter their markets.

ILECs have had an opportunity to disaggregate support to prevent cream-skimming. They have had an opportunity to play to their strengths by rolling out advanced services so they can retain a competitive edge as competition increasingly becomes a reality. Accordingly, attempts by some parties to use unsubstantiated claims of harm to close the door on competition and protect incumbents – at a time when the benefits of competitive ETCs are just starting to be felt in rural communities – must be rejected.

⁵ Claims that high-cost support to wireless carriers go “straight to the bottom line” reflect a lack of understanding of basic accounting principles. The Commission should ignore irresponsible and unsupported statements alleging inappropriate conduct by competitive carriers.

⁶ *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) (“*Fourteenth Report and Order*”).

B. More Accurately Targeting Support to High-Cost Areas is Critical to Stabilizing Fund Size.

As competition is now beginning to come in the form of new ETCs being designated, it is becoming clear that more precisely directing support to high-cost areas is a critical component of universal service that has not been fully implemented. Rural ILECs, who argued in the RTF process that disaggregation was critical to protecting them from subsidized competitive entry in low-cost areas, have used their Path 1 filings to shield them from competitive entry.⁷ Their arguments to the states have been uniformly rejected across the country, and it appears that the FCC is the only regulatory body that has even remotely accepted their flawed thesis that disaggregation does not adequately protect incumbents.

Critical to this issue is the fact that non-rural carriers operating in Model Support states have been disaggregated for four years and in many of them competitive ETCs (“CETCs”) have entered. No party has alleged that the system there is not working properly to ensure that competitors have an appropriate incentive to drive investments out to higher-cost areas.

The importance of more accurately targeting support increases with each new CETC designation. As more new CETCs are designated in areas served by rural ILECs that have chosen Path 1 disaggregation, the problems of over- and under-compensation are exacerbated. For example, Virginia Cellular was designated in a very high-cost area where the support levels are inordinately low due to Path 1 disaggregation by the rural ILEC. At the same time, Virginia

⁷ The option not to disaggregate (Path 1) was established to address narrow circumstances where, “given the demographics, cost characteristics, and location of its service territory, *and the lack of a realistic prospect of competition*, disaggregation is not economically rational. For example, a carrier may serve only a few lines or a very small study area with little geographic variability.” *Fourteenth Report and Order, supra*, at ¶ 148 (footnote omitted, emphasis added). With no incentive to disaggregate, and with the promise of raising “cream-skimming” to block ETC designations at a later date, it is not surprising, in hindsight, that the vast majority of rural ILECs would forgo disaggregation despite the simple procedures set forth in the FCC’s rules.

Cellular was denied ETC status in a lower-cost wire center of another Path 1 ILEC because the FCC concluded the averaged per-line support would be excessive.⁸

The RTF took this issue up five years ago and concluded, with a consensus of wireless and wireline carriers, that disaggregation is needed to more accurately target support and protect rural ILECs from subsidized competitive entry in low-cost areas. Without any supporting evidence whatsoever, the FCC speculated in its *Highland Cellular* decision that disaggregation may not always protect ILECs,⁹ and the Joint Board regurgitated the same baseless claim in its recent recommendation.¹⁰ States that have carefully considered this matter have properly rejected this unwise and unsupported policy shift.¹¹

It is widely accepted that disaggregating support to the wire center level is not an onerous task, even for small rural ILECs.¹² The Commission should modify its rules to require all ILECs to immediately disaggregate support under Path 2, at least to the wire center level.¹³ This one action will greatly improve the transparency of the system so that competitors can make a more reasoned choice as to whether to enter some areas. If support is moved out of low-cost areas,

⁸ See *id.* at 1579-81. For a more detailed discussion of this portion of the order, see *Virginia Cellular, LLC, Petition for Reconsideration* (filed Feb. 23, 2004).

⁹ *Highland Cellular, Inc.*, 19 FCC Rcd 6422, 6437-38 (2004) (“*Highland Cellular*”).

¹⁰ See *2004 Recommended Decision, supra*, 19 FCC Rcd at 4279.

¹¹ See Supplemental Comments of the Minnesota Public Utilities Commission in CC Docket 96-45, filed May 14, 2004; Supplement to Petition by the Colorado Public Utilities Commission in CC Docket 96-45, filed May 14, 2004; Northwest Dakota Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless et al., Case No. PU-1226-03-597 et al. (N.D. PSC, Feb. 25, 2004) at pp. 10-12 (“*Dakota Cellular Order*”); AT&T Wireless PCS of Cleveland, LLC, Docket No. UT-043011 (Wash. Util. & Transp. Comm’n, 2004) at p. 9 (“*AT&T Washington Order*”); Easterbrooke Cellular Corp., Recommended Decision, Case No. 03-0935-T-PC (W.V. PSC, May 14, 2004) at p. 55 (“*Easterbrooke Cellular*”).

¹² See, e.g., *RCC Minnesota, Inc. et al.*, Docket No. 2002-344 (Me. PUC, May 13, 2003) at p. 10 (“*RCC Maine Order*”) (noting that Community Service Telephone (“CST”), an ILEC intervenor, had acknowledged that “disaggregation itself did not impact [its] bottom line.”).

¹³ See *Comments of General Communication, Inc. (“GCI”)* at p. 24.

carriers will likely decline to seek ETC designation in those areas. Alternatively, the Commission should require such disaggregation immediately upon designation of a competitive ETC in any portion of an ILEC study area.¹⁴

In state ETC designation cases where USCC has applied, some opponents have argued unsuccessfully that areas where competitors would receive high-cost support are in fact low-cost areas for the competitor.¹⁵ What these commenters ignore is the critical need for disaggregation – to ensure that competitors do not receive uneconomic levels of high-cost support in areas that are low-cost for the incumbent. It is not necessary for a competitor to receive support that matches an ILEC. In any particular area, support needed by a competitor may be higher or lower than that needed by an ILEC. The focus must be to ensure that the ILEC is not treated unfairly.

For example, in a very low-cost area, the ILEC may disaggregate so that no support (\$0.00) is available. At that level, if a competitor's costs are lower, then any market advantage it enjoys as a result is entirely appropriate. On the other hand, in a very high-cost area, the ILEC may have an insurmountable advantage by virtue of having an embedded network and the fact that there are very few available customers.

With disaggregation must come accurate maps. The Joint Board has recommended that rural ILECs provide accurate maps so that competitors may more accurately target line counts by billing address.¹⁶ In Oregon, where USCC recently applied, it was discovered that the ILEC study area maps on file with the Oregon commission contained material inaccuracies. These

¹⁴ This similar to, and would be properly implemented together with, Centennial's well-reasoned proposal to amend the FCC's rules to make *service area redefinition* automatic upon designation of a CETC in a portion of its service area. See Centennial Comments at p. 16. Under such a proposal, it would be unnecessary to seek FCC concurrence – with the resulting delay of service to consumers – once the state commission issues a designation order finding the rural ILEC service area should be redefined along wire center boundaries.

¹⁵ See, e.g., United States Cellular Corp., Docket 1084 (Oregon PUC, June 24, 2004).

¹⁶ See *2004 Recommend Decision*, 19 FCC Rcd at 4300-01.

inaccuracies contributed to USCC (and RCC) having substantial errors in the preliminary line counts that the companies filed with USAC for customers with a billing address in the Helix Telephone Company area. Although USCC and RCC worked with information obtained from the ILECs to generate a comprehensive, accurate map – and absorbed the substantial cost of doing so – Oregon’s rural ILECs alleged that in areas where the initial mapping discrepancies produced inaccurate line counts were filed, USCC intentionally filed more line counts than the ILEC in a particular study area. Still worse, the same Oregon ILECs sponsored comments in this proceeding repeating the false statements, even after USCC has filed corrected line counts, which plainly appear in USAC’s 4th Quarter 2004 Appendices.¹⁷ These irresponsible statements should be ignored.

The Commission long ago figured out that there are three keys to leveling the playing field – (1) portable per-line support to competitors, (2) more accurately targeting support so that ILECs are protected, and (3) requiring competitors to respond to all reasonable requests for service throughout the ETC service area.¹⁸ With these three keys in place, it matters little where a competitor is designated. If it is designated only in low-cost areas, then it will receive little or no support. If it is designated only in high-cost areas, then it will receive higher levels of support needed to construct facilities in those areas.¹⁹

¹⁷ Comments of the Coalition of State Telecommunications Associations and Rural Telephone Companies (“Coalition”) at p. 19; USCC’s 4th Quarter 2004 line count filing for the Helix Telephone Company in Oregon can be found at: <http://www.universalservice.org/overview/filings/2004/Q4/default.asp> at HC 18, at line 1237.

¹⁸ See generally *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997) (“*First Report and Order*”); *Fourteenth Report and Order*, supra; *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, 15 FCC Rcd 15168 (2000) (“*South Dakota Preemption Order*”).

¹⁹ The Coalition recycles its misleading allegation that USCC proposes to build cell sites “largely in non-rural areas.” Coalition Comments at p. 7. In fact, USCC proposed to construct cell sites in rural areas with all available support and proposed other sites in areas served by carriers that the FCC classifies as “non-rural”. Those “non-rural” wire centers can hardly be said to be “low-cost”, a fact borne out by the very high levels of state universal service

The Commission need look no farther than its Model Support states, where support has been disaggregated for four years, where the geography is sometimes very rural, and where new CETCs have entered. CETCs have entered in Mississippi, Alabama, Maine, Vermont, and West Virginia and are providing service in Model Support areas. To date, no party has alleged that competitive entry has harmed consumers or is unfair, while each state has seen significant new investment in wireless facilities that have delivered significant benefits to consumers.

III. USCC IS USING SUPPORT TO DRIVE INFRASTRUCTURE INVESTMENT IN RURAL AREAS.

Most competitive eligible telecommunications carriers (“CETCs”), including USCC, have been eligible to receive support for a relatively short period of time. Thus, it is much too early to fairly assess market shifts as a result of competitive entry. However, USCC is aggressively investing in new construction projects and upgrading existing infrastructure to deliver benefits to rural consumers.

In Wisconsin, USCC was granted ETC status in December of 2002 and received funding through most of 2003. The company operates the Wisconsin 6, 7, 8, 9 and 10 Rural Service Area (“RSA”) markets, and also operates in some very rural areas within other Wisconsin Metropolitan Statistical Areas (“MSAs”) that are served by rural ILECs. To summarize USCC’s progress in 2003, for which the books are now closed, the company’s 2003 budget for capital expenditures in Wisconsin was over \$31 million, of which approximately \$6.8 million was federal high-cost support for Wisconsin’s rural areas. The infusion of support enabled the company to accelerate construction projects in rural areas of the state that would not otherwise have been made.

support received by the incumbents in those areas. Constructing facilities to serve these extremely rural areas is exactly how federal high-cost support should be used.

Last year, USCC invested over \$12 million in the five RSAs listed above, including but not limited to adding new cell sites, upgrading to CDMA technology, increasing cell site capacity, installing in-building or micro-cells to improve coverage, adding backup generator capacity, upgrading backhaul links, and sectorizing or adjusting cell sites to enhance coverage.

The company will have a similar story to tell when 2004 comes to a close, and in the years to come. The availability of federal high-cost support has enabled the company to accelerate deployment and improvement of its network in ways that would not be possible without support, to the benefit of Wisconsin's consumers. Over time, rural areas in Wisconsin are going to see wireless services become a potential substitute for wireline services as a result of the Congress opening up federal high-cost support to carriers like USCC who are devoted to America's rural communities.

IV. A TIERED PROPOSAL TO LIMIT SUPPORT PAID TO COMPETITIVE ETCs IS A COMPLETE NON-STARTER.

A proposal presented to the Commission by OPASTCO, RICA, and RTG, was thinly disguised as an industry compromise between wireline and wireless carriers but in fact is an ILEC-sponsored plan structured so as to divide their wireless opposition and arbitrarily cut down on the number of competitors that enter into their markets.²⁰ The proposal to provide support on a graduated scale depending upon the size of the CETC completely contravenes the 1996 Act and would guarantee market outcomes in favor of ILECs, which the *Alenco* court has already ruled to be anathema to the Act. It is a complete non-starter for the wireless industry, including USCC.

The RTA proposal discriminates against otherwise qualified carriers that must by law have an opportunity to demonstrate the capability and commitment to extend service to rural

²⁰ Comments of Rural Telecommunications Associations ("RTA").

areas. Providing unequal levels of support to competing carriers cannot possibly comply with Section 214, which contains no language that could be interpreted to permit the FCC or any state to restrict entry as an ETC by class of carrier.

USCC's operations provide a perfect example of why the proposal must be rejected. USCC serves roughly 4.7 million subscribers, the majority of which are located in a very small geographic area of Chicago and a few other metropolitan areas. The rest of USCC's customers are spread over an enormous geographic area in 26 states with the vast majority of territory being either rural, or very rural, including areas unserved by wireline carriers in several states such as Washington and Oregon. In Oregon, USCC's service area is huge and it is not licensed to serve the Portland MSA.

The RTA proposal contemplates not a single dollar of support lost by ILECs. That is, ILECs would be guaranteed support and economic security, no matter what their performance, while competitors would continue to take business risk with less support when attempting to enter rural areas. The Act provides that all support must be explicit, and the FCC has ruled such support must be portable for the benefit of consumers. That is all USCC is asking for.²¹ What RTA seeks to achieve "is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act."²²

This proposal must also be rejected because RTA fundamentally misunderstands "a primary purpose of the Communications Act--to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service.

²¹ 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."); *First Report and Order*, *supra*.

²² *Alenco*, *supra*, 201 F.3d at 622.

They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers, a guarantee that conflicts with competition.”²³

GVNW goes so far as to claim, without citation to any authority, that “rate of return carriers are entitled, as a matter of law, to a full recovery of their costs in providing interstate services.”²⁴ We beg to differ. That model, if it ever existed, went out with the 1996 Act. The FCC’s clear policy direction since has been to advance competition and universal service, fulfilling the Act’s mandate that all support must be made explicit²⁵ and rural consumers must have choices in services and service providers that are comparable to those in urban areas.²⁶

Once support is explicit and fully portable, all carriers can compete for consumers and for support on a level playing field to the consumers’ benefit. The idea that one class of carrier is guaranteed to succeed in the market while all others are locked out because support levels are skewed in favor of the incumbent died eight years ago.

V. RESPONSES TO OTHER COMMENTS.

A. In Many Rural Areas, CETCs Do Not Effectively Compete With ILECs in the Local Exchange Marketplace.

Some commenters continue to perpetuate the myth that wireless carriers are already competing in rural America and that, therefore, support is not “necessary.” The simple facts are as follows:

²³ *Id.* at 625.

²⁴ GVNW Comments at p. 9.

²⁵ 47 U.S.C. § 254(b)(5); *First Report and Order*, *supra*.

²⁶ 47 U.S.C. § 254(b)(3).

1. Consumers in many rural areas are frustrated that the service quality offered by wireless carriers is not commensurate with that enjoyed by urban consumers; and

2. Some wireless carriers who focus on rural America, such as USCC are very anxious to extend service out to requesting customers, but have been frustrated in that goal to date because wireline companies have all the customers in a locale and all the support.

USCC recently applied for ETC status in Maine. In the course of preparing its petition, USCC contacted law enforcement, public safety, political, and community leaders to determine whether they would support USCC's petition. The response was overwhelmingly in favor of USCC's petition. Virtually every person USCC contacted complained about wireless services (not only USCC's) in rural Maine and expressed a strong desire to have high-quality services that can be found in the Portland, Maine metro area. Over three dozen people submitted testimony to the Maine Public Utility Commission in support of USCC's petition. We have attached as Exhibit 1, a cover letter from USCC's local counsel, Kimball L. Kenway, summarizing and transmitting the testimony to the Maine Commission. The letter paints a powerful picture of numerous communities that do not have essential wireless services and the health and safety benefits that urban areas take for granted.

Recently, the FCC released its latest CMRS competition report in which it declared that 96.8% of counties in the U.S. have at least three wireless communications providers.²⁷ Unfortunately, this statistic does not convey any sense of whether there is effective competition in any area, nor does it provide any data concerning whether any particular county has high-

²⁷ Report to Congress, Ninth Annual CMRS Competition Report, Wireless Telecommunications Bureau (Sept. 9, 2004), which can be found at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-251984A1.pdf

quality, robust networks that can compete with ILECs outside of major population centers.²⁸ In USCC's recent petition for ETC status in Oregon, its expert witness testified that:

Rural ILECs did not begin by providing service with a network whose reach extended throughout their current service areas; they began by constructing facilities where it was most feasible and then expanding those facilities over time – *while receiving implicit or explicit universal service support*. At no time was that support withheld because the rural ILEC was “already providing” wireline service in some part of these areas.²⁹

Consumers in rural Maine have been waiting over two decades now to enjoy wireless service that is commensurate in quality to that available in urban areas. With high-cost support, USCC is prepared to deliver those benefits, exactly as the 1996 Act intended.

B. Many of the ILECs' Proposed “Minimum Requirements” and the FCC's Acquiescence to TOPUC Will Lead to State-Imposed Hurdles That Contravene the Statutory Scheme by Improperly Disfavoring Competitors.

Perhaps emboldened by the Commission's recent acquiescence to the TOPUC decision in the *Virginia Cellular* case,³⁰ wireline LEC commenters offer up a number of misguided proposals for increasing the criteria for designation of new ETCs.³¹ Collectively, the commenters

²⁸ Commissioner Copps properly noted that “The central question of the legislation that requires this Report is whether the market is characterized by “effective competition.” Yet again this year the Report does not provide a useful definition of this term. Without an well-articulated “effective competition” standard, the Report will always have trouble providing an analytically solid foundation for Commission or Congressional action.”

²⁹ In the matter of United States Cellular Corp., UM Docket No. 1084, Testimony of Don J. Wood.

³⁰ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“TOPUC”).

³¹ To cite just two examples, the National Telecommunications Cooperative Association (“NTCA”) claims that a Proposal for Decision (“PFD”) issued by a hearing officer of the Vermont Public Service Board (“PSB”) in March 2003 required an ETC applicant to demonstrate that capital spending was greater than universal service support plus a reasonable base level of spending. NTCA Comments at p. 21 n.41. ATA claims that the PFD required the applicant to provide “universal coverage”. ATA Comments at p. 5. However, the PFD was subsequently overruled on both counts in a November 2003 PSB decision, holding that:

While the Board believes that investment in capital construction is a useful indicator of an ETC's progress toward ubiquity of coverage, we do not believe that it is critical to demonstrating compliance with ETC certification. The Board agrees with RCC that it is also important that support be used to expand the volume of calls that the company can manage as customers access the network from their homes, cars or work places. An ETC's investments in service quality and service overall for existing customers are as necessary to serving the public interest as investments

seek to discourage competitive entry and regulate competitors as if they were monopoly wireline carriers.³² However, imposing additional criteria on new entrants is not only bad public policy, it is contrary to the Act's "pro-competitive, de-regulatory" purposes.³³ We refer the Commission to our initial comments in this proceeding, wherein we set forth in detail why the errant *TOPUC* decision is not binding on the Commission and why the recently announced and unexplained flip-flop on the matter (by the Commission in *Virginia Cellular* and the Joint Board in its 2004 *Recommended Decision*) must be reversed.³⁴

Congress intended to introduce competition throughout the land, but never imposed ILEC-style regulatory requirements on new entrants seeking ETC status.³⁵ With respect to wireless competitors, Congress passed Section 332(c)(3) of the Act, which prohibits states from regulating wireless rates and entry and "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance."³⁶ The danger presented by the wireline industry's proposals is that the national deregulatory framework for what is obviously an interstate service

in the geographic expansion of coverage. Therefore . . . RCC only will be required to provide evidence that it uses universal service support for the provision, maintenance, and upgrading of facilities and services for which the support was intended, in the same manner as wireline ETCs."

RCC Atlantic, Inc. d/b/a Unicel, Docket No. 5918 (Vt. Pub. Serv. Bd., Nov. 14, 2003) at p. 48.

³² For example, the recurring theme in the criteria proposed by TDS Telecommunications is "comparable to the wireline LEC". See TDS Comments at pp. 8-9.

³³ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (stating that the goal of the 1996 Telecommunications Act is "to provide for a pro-competitive, de-regulatory national policy framework" aimed at fostering rapid deployment of telecommunications services to all Americans "by opening all telecommunications markets to competition....").

³⁴ See RCA-ARC Comments at pp. 30-38.

³⁵ First Report & Order, supra, 12 FCC Rcd at 8858 ("section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs.").

³⁶ *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order*, 10 FCC Rcd 7025, 7030 (1995), *aff'd*, *Connecticut Dept. of Pub. Util. Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

will be frustrated by individual state commissions, who will impose local requirements that ignore the realities of wireless carriers. RBOCs, who operate in many states, face this hurdle today and USCC supports deregulation when their monopoly control of the local exchange marketplace is removed through the introduction of effective competition.

The FCC's improper acquiescence to the Fifth Circuit's *TOPUC* decision has significant consequences for CETCs. Once on file, a carrier must amend a tariff whenever it changes terms, and in some cases state approval is required. Oklahoma has required tariffs, along with specialized and detailed service quality reports, including requiring the creation of a table of complaint codes that must be meticulously logged and reported.³⁷

What is the effect of having individual state requirements on a business that is essentially interstate from a regulatory perspective and most often multi-state from an operational one? The primary effect is to artificially and significantly raises competitors' costs. When a wireless carrier that operates in more than one state must change its billing practices or how it logs complaints for one state, the cost of software changes, training staff, and other associated adjustments is enormous. Wireless carriers often operate on a larger scale than most rural ILECs, with call centers staffed 24/7 and storefront operations open six or even seven days per week. For N.E. Colorado Cellular, having two regulatory regimes in Colorado and Nebraska is a very challenging. For USCC, which operates in 26 states, it is an administrative nightmare.

States also improperly discriminate between CMRS carriers who are ETCs and those who are not. The Joint Board's advice that states should not regulate for new entrants to achieve "parity for parity's sake"³⁸ does not go far enough. The Commission should advise state

³⁷ At the behest of rural ILECs, the ALJ in USCC's proceeding proposed to require 1000 minutes of use be included on all wireless rate plans. However, that decision was reversed by the full commission.

³⁸ 2004 *Recommended Decision*, *supra*, 19 FCC Rcd at 4271.

commissions that any proposed regulations on prospective ETCs must be considered in rulemakings of general applicability and NOT in an ad hoc fashion in the course of an ETC designation proceeding.³⁹ In such cases, individual carriers have often acquiesced to commission pressure and the enormous cost of continuing litigation to accept conditions that are otherwise unlawful.⁴⁰ In a rulemaking proceeding, all parties have an opportunity to participate without such coercion.

Professor James Ming Chen foretells the mischief that the FCC will create by acquiescing to the Fifth Circuit's erroneous TOPUC decision, permitting individual states to add conditions to CETCs:

When implemented locally, telecommunications law systematically favors local incumbents. To retain any hope of true competition, federal telecommunications law must exert deregulatory discipline from above.⁴¹

It is not appropriate to have some CMRS carriers subject to some state regulations while others remain unregulated. Calls for higher barriers to entry and regulatory parity ignore that ILECs did not receive a highly regulated status as a *quid pro quo* for ETC status. ILECs are regulated because consumers must be protected from monopoly business practices. Regulations must distinguish between monopolies and competitors. They should not discriminate among competitive carriers. If as a result of new entrants providing effective competition, USCC fully

³⁹ See, e.g., General Investigation, Case No. 03-1199-T-GI (West Virginia PSC).

⁴⁰ See, e.g., the dissent of Colorado PUC Chairman Greg Sopkin in WWC Holding Co., Inc., Docket No. 03A-061T Decision No. C040545 (2004), appeal pending, *WWC Holding Co., Inc. v. Sopkin*, Civ. Act. 04-1682, D. Ct., Colorado, 2004).

⁴¹ Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls, *Journal on Telecommunications & High Technology Law*, Volume 2, Issue 1 at p. 373.

supports substantial deregulation of incumbent carriers so that all have relatively low regulatory burdens.⁴²

C. Supporting Carriers on Their Own Costs Will Balloon the High-Cost Fund.

Now let's look at what is likely to occur if CETCs are paid on their "own costs."

Presumably, if the newcomer constructed additional network facilities to "compete", any method for paying high-cost support based on network costs would ensure that the competitor could earn a sufficient return on investment. In such a case, it is possible, if not likely, that inefficient investments would be made based on the ability to get high-cost support, irrespective of whether a business case can be made for competitive entry.

In USCC's view, this is exactly the wrong result. Unfortunately for ILECs, if wireless carriers receive support based on a wireless cost model, the relative youth of wireless networks may lead to a gold-rush mentality as carriers sweep into rural areas on the promise of high-cost funding sustaining bad business decisions. On the other hand, if support is portable and is dependent upon having a customer, then all carriers become customer-centric, which is exactly the appropriate incentive to place upon service providers. It serves the public by enabling competitors to drive innovation and quality of service, rather than having it imposed by regulators.

As USCC discussed in its initial comments, paying each competing carrier on its own costs will only ensure that unneeded network construction is undertaken without concern for efficiency. If limiting growth of the fund is a goal – while being fair to market participants, and

⁴² To date, no party has identified a single consumer harm that has resulted from a new ETC having been designated, even in states such as Washington, Virginia, Alaska, Wisconsin and Iowa that have declined to impose additional regulations on new ETCs.

providing consumers in as many areas as possible the benefit of sustainable competition – then this proposal goes in exactly the wrong direction on all counts.

VI. CONCLUSION.

Soon, the number of wireless phones in use is going to surpass that of wireline.⁴³ This shift is accelerating in urban areas because of the availability of high-quality networks. Federal policy must keep up with market reality, to ensure that the technology consumers want and need is made available in rural areas.

Those who continue to argue that the Commission should go back to pre-1996 and cement market outcomes for one class of carrier need to move forward into the present and prepare to compete for consumers. USCC expects that if competition comes to rural areas, consumers will benefit and, eventually, rural ILECs will be significantly deregulated. Deregulation will unleash additional market efficiencies that will bring more consumer benefits.

As long as support levels are sufficient for consumers to get the supported services, it matters not which carrier delivers them. If the FCC's current policy succeeds in driving the development of high-quality wireless networks in rural areas, then consumers will benefit by having choices among wireline, wireless, and perhaps new platforms that can efficiently deliver the supported services.

Respectfully submitted,

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⁴³ See Centennial Comments at pp. 1-2 and n.7; Comments of Western Wireless Corporation at pp. 14-15.

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September 21, 2004

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I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 21st day of September, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *REPLY COMMENTS* filed today to the following:

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